No. 89-6985-CFY
Status: DECIDED

Title: Horacio Alvarado, Petitioner
v.
United States

Docketed:
March 19, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Clott,Abraham L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 19 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 5 1990		Supplemental brief of petitioner Horacio Alvarado filed.
5	Apr 18 1990		Order extending time to file response to petition until May 19, 1990.
6	May 21 1990		Brief of respondent United States in opposition filed.
7	May 23 1990		DISTRIBUTED. June 7, 1990
8	May 25 1990	X	Reply brief of petitioner Horacio Alvarado filed.
10	Jun 8 1990		REDISTRIBUTED. June 14, 1990
11	Jun 11 1990	X	Supplemental brief of petitioner Horacio Alvarado filed.
13	Jun 15 1990		REDISTRIBUTED. June 21, 1990
15	Jun 25 1990		Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 21, 1990. Dissenting opinion by The Chief Justice with whom Justice O'Connor, Justice Scalia and Justice Kennedy join. Opinion per curiam.

****

(8)

No. 89- 89-6985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioners,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

RECEIVED
MAR 19 1990
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Horacio Alvarado respectfully requests leave to proceed here in forma pauperis, without payment of fees and costs.

Counsel certifies that in the court below, counsel was assigned to represent petitioner, pursuant to the Criminal Justice Act.

Dated: New York, New York
March 16, 1990

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO.

29 pp

ORIGINAL

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner Horacio Alvarado.

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether intentional discrimination by the government in selecting a petit jury in violation of the fifth amendment is rendered harmless merely because the final composition of the jury somewhat reflects the district of trial?

TABLE OF CONTENTS

TABLE OF CASES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Horacio Alvarado respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit rejecting his claim that he was entitled to a new trial because of intentional discrimination by the government in selecting the petit jury and affirming a judgment of the United States District Court for the Eastern District of New York convicting him of extortion and conspiracy to commit extortion.

OPINION BELOW

On December 7, 1989, the Court of Appeals rendered an opinion, reported at 891 F.2d 439, which is annexed as Appendix A 3-10. On February 20, 1990, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc in an order which is annexed as Appendix A 2.

JURISDICTION

On March 5, 1990, the Court of Appeals granted petitioner's motion for a stay of the mandate for thirty days pending an application to this Court. A copy is annexed as Appendix A 01.

No application has been filed for an extension of time in which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation.

STATEMENT OF THE CASE

Petitioner, a black Hispanic who placed minorities in waterfront construction jobs, was retried on charges that he extorted payments from a contractor after a first trial ended with a hung jury. At the first trial, the defense was that all the payments received by petitioner were made to him in the course of his legitimate business as a minority hiring consultant. During jury selection for the second trial, the government used three of its seven available peremptory challenges to exclude blacks and one to exclude an Hispanic. The

government claimed that one black was excluded because he was young and sitting in seat number one sometimes chosen for foreperson, even though the trial judge ultimately instructed the jury to select a foreperson itself. A second black was excluded, according to the government, because she had children petitioner's age, even though it did not challenge other such jurors. The government claimed to have excluded the third black because she was a social worker, even though it did not challenge a paraprofessional guidance counselor. The Hispanic was excluded supposedly because of his difficulties with English, even though the only evidence in the record relied upon by the government in support of this claim is that defense counsel acknowledged that the individual spoke with a thick accent.

The Magistrate before whom jury selection was held without objection accepted the government's explanations about two of the excluded venirepersons--the young man in seat number one and the social worker--but made no other factual findings. Rather, after some colloquy acknowledged by the Court of Appeals below to be confused and as reflecting a misunderstanding by both the Magistrate and the prosecutor of the procedures to be followed in resolving a Batson challenge, the Magistrate ruled that petitioner had not made even a prima facie case of discrimination. On appeal to the Second Circuit, petitioner argued that he had established a prima facie case under Batson because of the number of strikes excluding minorities, the palpable lack of merit of the government's ex-

planations, and the unusual factual context in which the government knew from a prior trial that petitioner's racial and ethnic status was crucial to the defense.

The Court of Appeals, however, refused to decide whether petitioner had established a prima facie case, but ruled that whether the government in fact discriminated against blacks and Hispanics was irrelevant: "[O]ur task in assessing a claim of discriminatory use of peremptory challenges on appeal from a conviction is to determine whether the group alleged to have been impermissible challenged is 'significantly underrepresented' in the jury that convicted the appellant." 891 F.2d at 445. The court concluded that "we do not believe that the incremental benefit of enforcing Batson . . . by vacating convictions obtained with fairly representative juries is warranted." Id. The principal authority relied upon by the court was McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), appeal dismissed, No. 84-2026 (2d Cir. Oct. 23, 1986), a decision rendered before both Batson and Holland v. Illinois, 58 U.S.L.W. 4162 (Jan 22, 1990), that applied sixth amendment analysis to the issue of discrimination in the selection of a petit jury. Thus, even if a prima facie case had been established by petitioner and not rebutted by the government, reversal was not requied, according to the court below, because the jury adequately represented the Eastern District of

New York by including one black and two Hispanics.[1]

[1] The panel did rule that the Government's argument that Hispanics are not a protected class for purposes of Batson analysis was without merit. 891 F.2d at 443-44.

REASONS FOR GRANTING THE WRIT

INTENTIONAL DISCRIMINATION BY THE GOVERNMENT IN SELECTING A PETIT JURY IN VIOLATION OF THE FIFTH AMENDMENT IS NOT RENDERED HARMLESS MERELY BECAUSE THE FINAL COMPOSITION OF THE JURY SOMEWHAT REFLECTS THE DISTRICT OF TRIAL

The opinion below holds, inconsistently with every circuit that has considered the issue, that a defendant has no remedy on appeal for intentional discrimination by the government during jury selection in violation of the fifth amendment if the final composition of the jury adequately reflects the demographic makeup of the district. The opinion totally ignores the interests identified by this Court in Batson v. Kentucky, 476 U.S. 79 (1986), in eradicating discrimination from the criminal justice system, interests crucial to the defendant, potential jurors, and the public at large. Reasoning as if the only interest at stake were the defendant's interest in the final racial composition of the jury, the court below based its analysis on a confusion of the interests protected by the equal protection component of the Fifth Amendment, which bars intentional discrimination, with those protected by the Sixth Amendment, which bars interference with the defendant's right to trial by a jury reflecting a fair cross-section of the community. If allowed to stand, the rule announced by the court below will be an open invitation to

racist prosecutorial tactics and to selection of jurors by minimum quotas rather than individual merits.

The opinion below is inconsistent with both this Court's precedents and the opinion of every other circuit that has considered the issue. This Court has made clear that discrimination in grand jury selection is never harmless error no matter how overwhelming the trial evidence, Vasquez v. Hillery, 106 S. Ct. 617, 622-23 (1986), and that excluding a potential juror improperly for his views on capital punishment requires reversal without speculating about how the jury would have been composed otherwise or what the outcome of the trial might have been, Gray v. Mississippi, 107 S. Ct. 2045, 2056-57 (1987). Indeed, this Court vacated two convictions for reconsideration in light of the Batson rule even though blacks had sat on the juries. Grandison v. United States, 107 S. Ct. 1270 (1987) (vacating opinion reported at 780 F.2d 425 (4th Cir. 1985)); Allen v. United States, 107 S. Ct. 1271 (1987) (vacating opinion reported at 787 F.2d 933 (4th Cir. 1985)). Accordingly, the decision below is inconsistent with the clear law of this Court governing impermissible tactics by the government in choosing a jury.

This Court has also made clear that the interests protected by the fair cross-section requirement of the sixth

amendment are distinct from those protected by the principle of equal protection. Holland v. Illinois, 58 U.S.L.W. 4162 (January 22, 199), thus casting into doubt the reliance by the court below on rulings that unsuccessful attempts by the government to deny a defendant his sixth amendment right to a trial before a jury reflecting a fair cross section of the community do not require a new trial.[2] No circuit has held that the number of minorities on the jury defeats a prima facie case under Batson per se, and at least three circuits have held that the final composition of the jury need not defeat a prima facie case. See United States v. Clemmons, 843 F.2d 741, 747 (3d Cir. 1988), cert. denied, 109 S. Ct. 97 (1988); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986).[3]

The right to equal protection reaffirmed in Batson extends to the defendant on trial, the potential jurors called

---

[2] Holland was decided while the petition for reharing was pending in the court below. Petitioner notified the court of the Holland decision and urged the court to reconsider its ruling (and reliance on prior Second Circuit law inconsistent with Holland) in light of that decision.

[3] By framing the issue as whether appellate relief were available assuming the existence of a prima facie case, the panel appeared to sidestep the question whether the percentage of minority group members sitting on the final jury defeated a prima facie case. It is inconceivable, however, that a factor that defeats relief ultimately would not also defeat a prima facie case. There is no point in finding a prima facie case despite the presence of a particular factor and subsequently denying relief because of that factor alone. Accordingly, the opinion below is inconsistent with the decisions of other circuits cited in the text, supra.

for service, and the public at large: Whenever the government excludes a potential juror only because of the defendant's race, it stigmatizes both the defendant and the veniresperson because of their race; the defendant suffers trial before a jury composed differently than one picked without regard to race; and the public is denied confidence in the fairness of the system of justice. See generally Batson v. Kentucky, 476 U.S. at 85-89; Carter v. Jury Commission, 396 U.S. 320, 329 (1970); Strauder v. West Virginia, 100 U.S. 303, 305 (1880). If the government excluded three blacks and an Hispanic because Horacio Alvarado is black and Hispanic, petitioner's jury was composed differently than it would have been absent impermissible discrimination. No amount of hindsight can determine accurately how the jury would have been composed otherwise or what the outcome of the trial would have been. See Gray v. Mississippi, 107 S. Ct. at 2056-57 (1987); Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (Goldberg, J.).[4] And the stigma against Horacio Alvarado and the excluded jurors was not lessened by the presence of another black and two other Hispanics on the jury, no more than a job applicant who is rejected because he is black is made whole by the employer's hiring somebody else who happens to be black. See Connecticut v. Teal, 457 U.S. 440, 450 (1982) (percentage of minorities in employer's workforce irrelevant in assessing discriminatory impact of employment test resulting in exclusion of particular individuals); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977) ("A single invidious discriminatory government act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.").

Because the court below failed to acknowledge the scope and extent of the constitutional wrong, it denied relief on the basis of a factor unrelated to the wrong. See generally Hobby v. United States, 468 U.S. 339, 350-63 (Marshall, J., dissenting).[5] The number of minority group members who

---

[4] Ross v. Oklahoma, 108 S. Ct. 2273, 2277-78 (1988), in which this Court refused to extend the analysis of Gray v. Mississippi to the erroneous denial under state law of "for cause" challenges to the defense does not suggest that appellant suffered no constitutional harm. In Ross, this Court considered the consequence of a peremptory challenge lost to the defense when it was expended to exclude a juror who should have been excluded for cause. The peremptory lost to the defense was a creature of state, not federal constituional, law. Thus, as the jury did not include anybody who the defense had a right to exclude, the defendant in Ross was not denied any federal constitutional right. The present case, in contrast, involves a direct deprivation of the most fundamental constitutional right of all--equal treatment of all races before the law--by exclusion of jurors who should have been

(fn. cont'd)

permitted to sit.

[5] The Hobby holding that a white male was not entitled to a new trial because of discrimination against blacks and females in selection of the grand jury foreman turned on the limited role of the foreperson and on appellant's non-membership in the class suffering discrimination. See Hobby v. United States, 468 U.S. at 344-50. The relevance of Hobby here is not its holding, but the framework for analysis set out in Justice Marshall's dissent, joined by Justices Brennan and Stevens, focusing on the impact of discrimination generally on the defendant, the excluded jurors, and the public and on the necessity of nullifying the verdict as a remedy.

eventually sit on the jury reflects no more than the extent of the government's discrimination, not whether discrimination occurred. And the justified refusal of courts to apply sixth amendment fair cross-section analysis to the composition of the fianl jury because groups of twelve are too small for statistical analysis also demonstrates the impropriety of denying relief because of the final composition. Whether or not the final jury included any particular number of minority group members may well have been, at best, an accident. But aside from being theoretically unsound, the opinion's focus on the composition of the jury will lead, in practice, to incongruous and unacceptable results.

Most importantly, the opinion below encourages the government to engage in racial discrimination that will appear harmless rather than to refrain from discrimination entirely. Under the new rule, the prosecutor will know that it faces no threat of losing a conviction so long as it does not exclude too many minorities. A prosecutor will be free to accept the first two or three minority group members who are called and to exclude the rest without explanation. By suggesting that Batson violations don't matter until there are too many, the new rule gives the government free rein to discriminate so long as it can find a minimum number of minority jurors who appear suitably pro-prosecution. It is hard to imagine a

rule that could do more to undermine confidence that justice is administered blindly in our courts.

Furthermore, the criterion relied upon by the court below--that the one black and two Hispanics who sat on the jury adequately reflected the district--does not provide a useful rule of decision. Even if it could be said that the one black who sat on the jury adequately reflected petitioner's Brooklyn community, the result in petitioner's case, under the court's analysis, would depend entirely on the racial composition of the district in which petitioner was tried. A defendant tried before an all white jury in the district of Iowa will not be entitled to relief even if the prosecutor excluded every minority venireperson because an all white jury will always reflect the racial composition of the mostly white district. At the other extreme, a defendant tried before a mostly black jury in the District for the District of Columbia might prevail under the new rule even if only one black were excluded because the presence of even a small number of whites on the final jury could prevent the jury from statistically reflecting the mostly black district.[6]

---

6 Indeed, the opinion below acknowledges implicitly that the result in this case may have depended on the trial date--before implementation of a new Jury Selection Plan providing that jurors will not be summoned from suburban counties for service in Brooklyn. See 891 F.2d at 444 & n.4. Accordingly, under the court's rule, petitioner would have been granted a new trial had the jury been selected after January 21, 1988, even though the underlying acts of discrimination requiring reversal were the same.

The issues presented by the decision below are of paramount importance. Individual acts of discrimination must be recognized to be prohibited by the principle of equal protection. If allowed to stand, the decision below will render all but the most extreme invidious discrimination in jury selection unreviewable. This Court should grant the petition for a writ of certiorari to make clear that the equal protection component of the due process clause of the fifth amendment requires that petitioner be retried if he established a prima facie case not rebutted by the government that the government discriminated against blacks and Hispanics in selecting a petit jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 16 1990

Respectfully submitted,

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street
10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO

A P P E N D I X

T 1080
1083

ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Second Circuit Rule 27 as governing use of this form is reprinted on reverse of Page 2. Note requirements that supporting affidavits be attached

UNITED STATES OF AMERICA,

Appellee,

- v. -

JAMES SCALA and HORACIO ALVARADO,

Appellants.

Use short title

88-1303(L), 88-1420

Docket Number

NOTICE OF MOTION

For an order granting appellant's motion for a stay for 30 days pending application to the Supreme Court for a writ of certiorari.

UNITED STATES COURT OF APPEALS FILED FEB 26 1990 ELAINE B. GOLDSMITH, CLERK SECOND CIRCUIT

MOTION BY: *(Name, address and tel. no. of party and of attorney in charge of case)*

THE LEGAL AID SOCIETY/FOSAU
By: ABRAHAM L. CLOTT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

United States Department of Justice
BY: FRANK J. MARINE, ESQ.
Criminal Division
1400 New York Ave., N.W., Room 2738
Washington, DC 20530
Tel. No.: (202) 633-1569

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Bartels, J., United States District Court, EDNY

Brief statement of the relief requested: For an order granting appellant's motion pursuant to Fed. R. App. P. 41(b) for a stay of the mandate for thirty days pending application to the Supreme Court for a writ of certiorari.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Signed name must be printed beneath

ABRAHAM L. CLOTT

Appearing for: *(Name of party)*

HORACIO ALVARADO

Date

February 26, 1990

Appellant or Petitioner: ☐ Plaintiff ☒ Defendant
Appellee or Respondent: ☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

UNITED STATES COURT OF APPEALS FILED MAR 5 1990 ELAINE B. GOLDSMITH, CLERK SECOND CIRCUIT

RECEIVED MAR - 7 1990

MAR - 5 1990

G. C. Pratt (G.C.P.)

V. Daniel Manton (V.D.M.)

FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FILED FEB 20 1990 ELAINE B. GOLDSMITH, CLERK SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of February, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,
Appellee,

V

JAMES SCALA and HORACIO ALVARADO,
Defendants,

HORATIO ALVARADO, Defendant-Appellant.

DOCKET NUMBER 88-1303

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant HORACIO ALVARADO

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

RECEIVED FEB 1990

Here was a man who was sorely troubled by the knowledge that his friend was doing something that he believed, and I believe, clearly was wrong. He sought advice from the best sources he knew, his minister and his lawyer. I regret that my colleagues see fit to pat Heller on the back for his contemptible conduct while they castigate Mark Davenport for doing what his conscience and his advisers told him was the proper thing to do.

I regret also that, as a result of our ruling in this case, every disgruntled employee in the Second Circuit henceforth will feel free to report to work with a tape recorder hidden on his person.

UNITED STATES of America, Appellee,

v.

Horacio ALVARADO, Defendant-Appellant.

No. 162, Dockets 88-1303(L), 88-1420.

United States Court of Appeals, Second Circuit.

Argued Oct. 5, 1989.

Decided Dec. 7, 1989.

Defendant was convicted of extortion and conspiracy to commit extortion by the United States District Court for the Eastern District of New York, John R. Bartels, J., and defendant appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that defendant was not entitled to reversal of conviction based upon allegations of *Batson* error.

Affirmed.

1. Jury ⇐33(5.1)

When defense counsel contends that prosecutor is exercising peremptory challenges in violation of equal protection clause, initial issue for judge is whether prima facie case of discrimination has been shown; to make prima facie showing of discriminatory peremptory challenges, defendant must demonstrate that members of his or her cognizable racial group were excluded from jury and that facts are sufficient to support inference of purposeful racial discrimination. U.S.C.A. Const. Amend. 14.

2. Jury ⇐120

Once prima facie case has been established in *Batson* challenge, burden shifts to party opposing claim of discrimination to offer legitimate, nondiscriminatory reasons for challenged acts; if opposing party carries burden of production and raises genuine issue of fact as to whether it acted with discriminatory intent, trier of fact must then decide, with burden of persuasion on claimant, ultimate issue of discrimination.

3. Jury ⇐121

In *Batson* challenge where judge acts as trier of fact, judge must determine whether defendant has proved by preponderance of evidence those underlying facts on which defendant relies to raise presumption that prosecutor used peremptory challenges in discriminatory manner; if claim is based on challenges used against group that is not obviously cognizable class, preliminary fact-finding must also resolve existence of such class; once preliminary fact-finding has been done, judge must then determine, as matter of law, whether underlying facts suffice to establish prima facie case.

4. Jury ⇐33(1.3)

Hispanics constitute cognizable group for purpose of assessing claims of discriminatory use of peremptory challenges; defendant is not required to establish that fact when challenging exclusion of Hispanics from jury.

5. Jury ⇐121

Under *Batson*, judicial officer must determine whether prima facie case is established, and if so, whether prosecutor's subsequent explanations adequately rebut presumption that Government used its challenges in discriminatory way; upon finding of discrimination, judicial officer should promptly take corrective action before jury selection has been completed.

6. Criminal Law ⇐1134(5)

Appellate court's task in assessing claim of discriminatory use of peremptory challenges on appeal from conviction is to determine whether group alleged to have been impermissibly challenged is significantly underrepresented in jury that convicted defendant; in absence of such underrepresentation, Sixth Amendment right to unimpeded possibility that jury will be fair cross section of community has not been violated. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1166.16

Defendant was not entitled to reversal of conviction based upon alleged *Batson* error; Blacks and Hispanics constituted 25% of jury, approximating their percentage in district of 29%.

8. Criminal Law ⇐986.4(1)

District court was not required to make specific finding as to allegations of factual accuracy in presentence investigation report; information in report was not relied upon in arriving at sentence.

Abraham L. Clott, New York City (The Legal Aid Society, New York City, on the brief), for defendant-appellant.

Frank J. Marine, U.S. Dept. of Justice, Washington, D.C. (Andrew J. Maloney, U.S. Atty., Brooklyn, N.Y.; Alan M. Friedman, U.S. Dept. of Justice, Washington, D.C., on the brief), for appellee.

Before NEWMAN, PRATT, and MAHONEY, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

This appeal concerns primarily the implementation of the holdings in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *McCray v. Abrams*, 750 F.2d 1113 (2d Cir.1984), *vacated and remanded*, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), *appeal dismissed*, No. 84-2026 (2d Cir. Oct. 23, 1986), proscribing a prosecutor's use of peremptory challenges on the basis of race or other impermissible categories. Horacio Alvarado appeals from the September 29, 1988 judgment of the District Court for the Eastern District of New York (John R. Bartels, Judge) convicting him, after a jury trial, of extortion and conspiracy to commit extortion, in violation of 18 U.S.C. §§ 1951, 1952 (1982 & Supp. V 1987), and sentencing him to a three-year term of imprisonment and a four-year term of probation. Alvarado, who is described by his counsel as half Black and half Puerto Rican, contests a discriminatory the Government's use of its peremptory challenges against Blacks and Hispanics and also seeks resentencing on the ground that the District Court did not make clear whether an unresolved factual dispute influenced its sentence. For reasons set forth below, we affirm.

1. Peremptory challenges

Jury selection was conducted before a magistrate without objection, a practice we have recently approved. *See United States v. Vanwort*, 887 F.2d 375, 382-83 (2d Cir.1989). The jury was chosen using the "jury box" system, with challenges exercised in "rounds." *See United States v. Blouin*, 666 F.2d 796 (2d Cir.1981). In round one, the prosecution used its challenge against a Black, William Clark; in round two, against a White; in round three, against an Hispanic, Mario Garcia; in round four, against a Black, Essie Calder; in round five, the challenge was waived; and in round six, against a White. In the selection of the three alternates, the Government used its one challenge against a Black, Sondra Brown.

At that point, counsel for Alvarado asked the Magistrate to require the prosecution to state its reasons for using four of its challenges against Black and Hispanic members of the venire. The prosecution's initial reply disputed the existence of a *prima facie* case of discriminatory use of peremptory challenges sufficient to require a statement of reasons. The prosecutor pointed out that in selecting the jury of 12

only three of six challenges had been used against minority members of the venire and that at the time a challenge was waived in the fifth round, two Hispanics and one Black were seated in the jury box, available to be challenged. The Magistrate then said he would afford the prosecutor an opportunity to state reasons "[i]f you wish to say anything," whereupon the prosecutor said that he was willing to respond but thought that a "finding" had to be made before the Government was obliged to state reasons. The Magistrate replied that "if you wish ... to explain I think it would be quite helpful of [*sic*] finding in this particular case" but made clear that no reasons were being required: "I'm giving you the opportunity to explain any of your challenges. I'm giving you that opportunity if you choose that's your prerogative."

The prosecutor then volunteered reasons for the four minority challenges: Clark was challenged because his youth and lack of experience made him an inappropriate candidate for foreman, which the prosecutor assumed he would become by virtue of his being juror number one; Garcia was challenged because his lack of fluency in English caused concern that he might have difficulty understanding tape recordings; Callier was challenged because, with children the age of the defendant, she might be unduly sympathetic; Brown was challenged because she was a social worker.[1]

After hearing these explanations, the Magistrate rejected defense counsel's complaint about the prosecutor's use of peremptory challenges, but the ruling left it unclear whether the Magistrate was determining as a matter of law that the defense had failed to establish a *prima facie* case of discriminatory use of challenges or was determining as a matter of fact that a discriminatory use of challenges had not occurred. First, the Magistrate accepted the prosecutor's explanations for the challenges to Clark and Brown. No explicit finding was made concerning the explanations for the challenges to Garcia and Callier. Then, seeming to reject a *prima facie* case as a matter of law, the Magistrate referred to the defendant's "initial burden" to "show a pattern ... of conduct to exclude minority members" and said "there is no pattern." However, seeming to rule on the ultimate issue as a matter of fact, the Magistrate also stated that "the government has explained itself in sufficient detail for me to make the following findings without hesitation" and concluded that "there was not an intent to make or deprivation of a right to a jury trial by peers."

The jury of twelve as empaneled included one Black and two Hispanics.

[1] When a defense counsel contends that a prosecutor is exercising peremptory challenges in violation of the Equal Protection Clause, the initial issue for the judge is whether a *prima facie* case of discrimination has been shown. *Batson v. Kentucky*, 476 U.S. at 93–96, 106 S.Ct. at 1721–23. To make a *prima facie* showing of discriminatory peremptory challenges, a defendant must demonstrate that members of his or her cognizable racial group were excluded from the jury and that the facts are sufficient to support an inference of purposeful racial discrimination.

> [T]he defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, [430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977)], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, [345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

1. The transcript, which is frequently garbled, attributes this explanation to the Magistrate, but the phrasing of the explanation makes it clear that it was the prosecutor who was speaking.

Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1723.

As the proceedings in the instant case reveal, confusion sometimes arises as to what is meant by "*prima facie* case" in this context and what procedure should be followed in ascertaining whether such a case has been presented. Normally, "*prima facie* case" means a presentation of evidence that suffices as a matter of law to warrant submission of an issue for decision by the trier of fact. 9 J. Wigmore, *Evidence* § 2494 (J. Chadbourn rev. ed. 1981). In the context of determining the existence of discriminatory intent, however, "*prima facie* case" has a different meaning. In this setting, as the Supreme Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the phrase means presentation of evidence sufficient to establish what the Court called "a legally mandatory, rebuttable presumption," *id.* at 254 n. 7, 101 S.Ct. at 1094 n. 7. The Court used this somewhat cumbersome phrase to convey the idea that where the evidence suffices to establish a "*prima facie* case" of discriminatory intent, the party claiming the existence of such intent is entitled to prevail if (a) the fact-finder believes the claimant's evidence and (b) the party resisting the claim offers no evidence. *Id.* at 254, 101 S.Ct. at 1094. The difference between the traditional and the special meanings of "*prima facie* case" is subtle: With the former, the fact-finder first decides whether to credit the claimant's evidence of the underlying facts and then is entitled to, but need not, draw the inference of the ultimate fact sought to be proved by the claimant; with the latter, the fact-finder determines only whether to credit the claimant's evidence of the underlying facts that give rise to the presumption but performs no fact-finding on the ultimate fact of discriminatory intent, since, where the conditions for the presumption are met, the claimant wins.[2]

[2] Once a *prima facie* case in this special, or "presumption" sense, has been established, the burden shifts to the party opposing the claim of discrimination to offer legitimate, non-discriminatory reasons for the challenged acts. If that opposing party carries this burden of production and raises a genuine issue of fact as to whether it acted with discriminatory intent, the trier of fact must then decide, with the burden of persuasion on the claimant, the ultimate issue of discrimination.

When the Supreme Court described the elements of a "*prima facie* case" in the context of a claim of discriminatory use of peremptory challenges, it was using the phrase in the "presumption" sense. This is apparent from footnote 18 of *Batson*, which explained that the "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules." 476 U.S. at 94 n. 18, 106 S.Ct. at 1721 n. 18. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, *supra*; and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)).[3]

2. The reason the claimant wins is that the existence of a *prima facie* case in the special or "presumption" sense of the term makes it "more likely than not" that the unexplained circumstances were in fact brought about by intentional discrimination. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978).

3. The operation of burden of proof rules in the context of a claim of discriminatory use of peremptory challenges is put in some doubt by the Court's statement that, after a *prima facie* case is presented, the party opposing the claim must "*demonstrate* that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Batson v. Kentucky*, 476 U.S. at 94, 106 S.Ct. at 1721 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972)) (emphasis added). Though the use of the word "demonstrate" might be thought to oblige the party opposing the claim to *persuade* the trier of fact that non-racial considerations were used, the Court dispelled this interpretation by stating elsewhere that the only burden shifted to the prosecutor is "to come forward with," *id.* at 97, 106 S.Ct. at 1723, and "to articulate," *id.* at 98, 106 S.Ct. at 1724, its nonracial explanation. The Court also emphasized that "[t]he party alleging that he has been the victim of intention

[3] Where, as in this case, the judge serves as the trier of fact, the role of the judge as determiner of a *prima facie* case is easily confused with the role of the judge as fact-finder on the ultimate issue—whether the prosecutor used peremptory challenges on a discriminatory basis. Confusion also arises because the threshold decision concerning the existence of a *prima facie* case of discriminatory use of peremptory challenges involves both issues of fact and an issue of law. The judge, as trier of fact, must determine whether the claimant (here, the criminal defendant) has proved by a preponderance of the evidence those underlying facts on which the claimant relies to raise a presumption that the prosecutor used peremptory challenges in a discriminatory manner. These facts concern the racial identities of those challenged and those available for challenge by the prosecutor and the racial composition of the venire and the community. If the claim is based on challenges used against a group that is not obviously a "cognizable class" within the meaning of our decision in *McCray*, this preliminary fact-finding must also resolve the existence of such a class. Once this preliminary fact-finding has been done, the judge must then determine, as a matter of law, whether these underlying facts suffice to establish a *prima facie* case.

In this case, the prosecutor correctly informed the Magistrate of the need to determine whether the defendant had carried his initial burden of presenting a *prima facie* case before the prosecutor could be obliged to state reasons for his challenges. However, the prosecutor was incorrect in inviting the Magistrate at that point to make a "finding," if by that term he meant a finding on the ultimate factual issue of discriminatory intent. Moreover, the Magistrate was incorrect to pretermit the determination of a *prima facie* case and leave it to the prosecutor's "prerogative" to offer explanations. In a proper *Batson* hearing, if the Magistrate was satisfied that the defendant had presented a *prima facie* case, at that point the burden would have shifted to the prosecutor to offer neutral explanations for challenging the jurors. *Batson v. Kentucky*, 476 U.S. at 97, 106 S.Ct. at 1723. Then the Magistrate should have made findings as to the legitimacy of the explanation offered by the prosecutor with respect to each challenged minority member of the venire. In outlining the allocation of burdens in a *Batson* hearing, we do not rule out the possibility that where a judge has ascertained that a *prima facie* case of discrimination has not been shown, a prosecutor, to protect an ensuing conviction in the event the threshold determination is rejected on appeal, may nevertheless elect to state explanations and invite the judge to assess their legitimacy. If the judge, as fact-finder, then concludes that no discrimination occurred, the prosecutor would have two grounds on which to defend the jury selection on appellate review.

On appeal, the parties join issue as if the Magistrate had ruled solely with respect to the existence of a *prima facie* case. The appellant contends that such a case was established, relying on the fact that, of the six challenges exercised by the prosecutor, four were used against minority members of the venire. In response, the Government contends first, that Hispanics are not a cognizable racial group under *Batson*. Next, the Government asserts that a *prima facie* case was not shown. In making this point, the Government, reflecting the confusion that occurred during jury selection, argues both that the pattern of exercising challenges did not create a *prima facie* case of discrimination and that the prosecutor's explanations had dispelled any basis for an ultimate finding of racial bias.

[4] We reject the Government's preliminary assertion that Hispanics are not a cognizable group for the purpose of assessing claims of discriminatory use of peremptory challenges as well as its subsidiary assertion that a defendant must affirmatively establish in each case that Hispanics constitute such a group. These positions

al discrimination carries the ultimate burden of persuasion." *Id.* at 94 n. 18, 106 S.Ct. at 1721 n. 18.

are untenable after our decision in *McCray*. There we affirmed the District Court's ruling that the defendant had proved a *prima facie* case of discriminatory peremptory challenges against Black and Hispanic venire members. 750 F.2d at 1133. Implicit in our holding was the view that Hispanics constitute a cognizable group, a fact that the defendant had not been required to establish when challenging their exclusion from the jury. *See United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir.1989); *United States v. Gerena*, 677 F.Supp. 1266, 1275 (D.Conn.1987); *United States v. Biaggi*, 853 F.2d [illegible] (Mexican-Americans), *cert. denied*, — U.S. —, 109 S.Ct. 1342, 103 L.Ed.2d 581 (1989); *cf. Castaneda v. Partida*, 430 U.S. 482, 495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) (underrepresentation of Mexican-Americans sufficient to establish *prima facie* case of discrimination in grand jury selection). Though issues may arise as to whether a particular individual is properly included within the category of "Hispanics," the classification has sufficient cohesiveness to be "cognizable" for jury discrimination claims. Indeed, it is somewhat surprising that the Executive Branch, which uses the term "Hispanic" and similar categories in implementing anti-discrimination standards, *see* 29 C.F.R. § 1607.4 (EEOC's use of category "Hispanic" in evaluating selection procedures under Title VII); *cf.* 13 C.F.R. § 317.2 (1989) (using term "Spanish-speaking" for minority business enterprises "set-aside" program), should disclaim the pertinence of the category "Hispanic" in the context of jury selection. *See United States v. Yonkers Contracting Co.*, 682 F.Supp. 757, 763 (S.D.N.Y.1988).

Whether Alvarado actually established a *prima facie* case is a closer question. In *Batson*, the Court indicated that evidence of a "pattern" of strikes against members of a cognizable racial group can give rise to an inference of discrimination. 476 U.S. at 97, 106 S.Ct. at 1723. Alvarado contends that such a pattern was established here because, of the six challenges used by the prosecutor, four were used against venire members who were Black or Hispanic. Appellant views this as a rate of minority challenges of 67 percent, which he asserts is considerably higher than the minority percentage of the venire. However, since the prosecutor waived one challenge at a point where minority venire members were available for challenge, it is more pertinent to note that the challenge rate was 57 percent (four of seven of all venire members and 50 percent (three of six) in the selection of the jury of twelve prior to the selection of alternates. The record does not disclose the minority percentage of the venire, but we may take judicial notice that the minority percentage of the Eastern District of New York, from which the venire was drawn,[4] is 29 percent.[5] *Batson's* citation of *Castaneda v. Partida*, 476 U.S. at 96, 106 S.Ct. at 1723, indicates that statistical disparities are a relevant factor in making a *prima facie* case, although a statistical disparity based on numbers as small as those normally involved in peremptory challenges is not as significant as those occurring in employment contexts where normally a larger universe is analyzed.[6]

[5] In this case, we need not determine whether this rate of minority challenges establishes a *prima facie* case of discriminatory peremptory challenges. The issue we face on appeal from a conviction is

4. Under the Jury Selection Plan of the Eastern District, as used at the time Alvarado's jury was selected, jurors summoned for service at Brooklyn were drawn from throughout the District. An amended plan, adopted January 21, 1988, provides that jurors will not be summoned for service at Brooklyn from Suffolk and Nassau Counties, but this amended plan has not yet been put into practice because of judicial vacancies.

5. This percentage is derived from the figures for the total populations and the Black and Hispanic populations of each of the counties of the Eastern District. Bureau of the Census, *Statistical Abstract of the United States* (108th ed. 1988).

6. *See* D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 9.1 (1980 & Supp.1987); Kaye, *Statistical Evidence of Discrimination in Jury Selection*, in *Statistical Methods in Discrimination Litigation* (D. Kaye & M. Aickin eds. 1986).

different from the one faced by a judicial officer in the course of jury selection. Under *Batson*, the judicial officer must determine whether a *prima facie* case is established and, if so, whether the prosecutor's subsequent explanations adequately rebut the presumption that the government used its challenges in a discriminatory way. Upon a finding of discrimination, the judicial officer should promptly take corrective action before jury selection has been completed. *McCray v. Abrams*, 750 F.2d at 1132 ("If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel.") As we emphasized in *Roman v. Abrams*, 822 F.2d 214 (2d Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989), "[I]t is incumbent upon the trial judge to apply the *McCray* Sixth Amendment principles *during the jury selection process*, and to grant the defendant an appropriate remedy when a *prima facie* case has been made of the prosecutor's racially discriminatory use of peremptory challenges and the state has not successfully rebutted that case by presenting creditable race-neutral reasons for the challenges." *Id.* 109 S.Ct. at 229 (emphasis added).

[6] However, our task in assessing a claim of discriminatory use of peremptory challenges on appeal from a conviction is to determine whether the group alleged to have been impermissibly challenged is "significantly underrepresented" in the jury that convicted the appellant. *Id.* In the absence of such underrepresentation, the Sixth Amendment right to the unimpeded possibility that the jury will be a fair cross-section of the community has not been violated. That was the holding in *Roman v. Abrams*, where we declined to disturb a conviction because no significant underrepresentation occurred. Arguably, this "bottom-line" approach is more appropriate for Sixth Amendment "fair cross-section" claims than for equal protection claims, but we do not believe that the distinction is warranted in the assessment of the use of peremptory challenges. *See United States v. Biaggi*, 673 F.Supp. 96, 107 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir.1988); *cf. Connecticut v. Teal*, 457 U.S. 440, 450, 102 S.Ct. 2525, 2532, 73 L.Ed.2d 130 (1982) (rejecting bottom-line analysis under Title VII). We recognized in *McCray* and *Roman* that the prosecutor's unwarranted exclusion of cognizable groups should be remedied on the spot, without waiting to see the ultimate composition of the jury. That assures a defendant that discriminatory use of peremptory challenges will be prohibited even in those cases where a fair cross-section might have resulted without prompt corrective action. In those few instances where corrective action should have been taken but was not, either because the judicial officer improperly failed to identify a *prima facie* case or improperly accepted insubstantial explanations from the prosecutor, we do not believe that the incremental benefit of enforcing *Batson* and *McCray* by vacating convictions obtained with fairly representative juries is warranted.

[7] Here, Blacks and Hispanics constituted 25 percent of the jury, approximating their percentage in the Eastern District of 29. Applying *Roman v. Abrams*, we see no basis for disturbing the conviction. In view of this conclusion, we need not consider the Magistrate's subsidiary findings made with respect to two of the prosecutor's explanations nor the ultimate finding, based on the entire record of the jury selection process, that no discrimination was established.

2. Sentencing.

[8] Alvarado also claims that the District Court relied on disputed facts to enhance his sentence, arguing that the presentence investigation report erroneously suggested that he caused damage to the construction site. The record shows, however, that the controverted matter did not influence the judge's sentence. The District Court disclaimed reliance upon this suggestion in the presentence investigation report, stating at one point, "I don't have to decide [whether the defendant caused the damage]." Since this issue was not taken into consideration, the District Court did not have to make a specific finding as to the allegations of factual inaccuracy in the report. We conclude that the sentence is valid.

The judgment of the District Court is affirmed.

Melvyn KAUFMAN, et al.,
Plaintiffs-Appellants,

v.

The CITY OF NEW YORK, et al.,
Defendants-Appellees.

No. 339, Docket 89-7621.

United States Court of Appeals,
Second Circuit.

Argued Nov. 13, 1989.

Decided Dec. 8, 1989.

Appeal from judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., granting defendants-appellees' motion to dismiss federal constitutional claims and dismissing pendent state law claims.

Milton S. Gould, New York City (Shea & Gould, Robert J. Ward, Jonathan M. Landsman, of Counsel), for plaintiffs-appellants.

Elizabeth S. Natrella, New York City, Asst. Corp. Counsel of the City of New York (Peter L. Zimroth, Corp. Counsel of the City of New York, Pamela Seider Dolgow, Asst. Corp. Counsel, Julian Bazel, Asst. Corp. Counsel, of counsel), for defendants-appellees.

Before FEINBERG and MESKILL, Circuit Judges, and COFFRIN, District Judge.*

PER CURIAM:

Plaintiffs-appellants, the holders of fee or leasehold interests in three Manhattan office buildings, appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., dismissing their complaint on the motion of defendants-appellees City of New York, the Environmental Control Board of the City of New York, Edward I. Koch, in his capacity as Mayor of the City of New York, and the Commissioners of the Department of Environmental Protection and the Department of Buildings. The district court dismissed plaintiffs' federal constitutional claims on the merits, and their pendent state claims for lack of subject matter jurisdiction.

Appellants challenge the constitutionality of New York City Local Law No. 76 of 1985 and related regulations (Local Law 76).[1] During 1968–1971, the period when the buildings in issue were constructed, appellants, in compliance with the city's prior fireproofing requirements, installed asbestos, which was then one of two city approved fireproofing materials. In 1971, the City banned the use of sprayed asbestos in building construction, and in 1985 Local Law 76 was enacted. That law requires, among other things, that the presence and condition of asbestos be ascertained before any building alteration or demolition is performed; that asbestos be removed or encapsulated if such work will cause asbestos to become airborne; and that all asbestos abatement activities be conducted in accordance with approved safety procedures by people with appropriate training and certification. Local Law 76 does not require that building owners remove asbestos that is undisturbed or that will not be disturbed by alteration or demolition.

Appellants contend that the challenged law effects a regulatory taking of their

* Honorable Albert W. Coffrin, Senior United States District Judge for the District of Vermont, sitting by designation.

1. Local Law 76 was amended in December 1986 by Local Law No. 80 of 1986. The main provisions of Local Law 76 as amended have been codified in the Administrative Code §§ 24-146.1 and 27-198.1.

ORIGINAL

RECEIVED
MAY 21 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 89-6985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, under Batson v. Kentucky, 476 U.S. 76 (1986), the government's exercise of peremptory challenges against black and Hispanic jurors required reversal of petitioner's conviction.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-6985

HORACIO ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C439-C436) is reported at 891 F.2d 439.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1989. A petition for rehearing was denied on February 20, 1990. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to commit extortion, and the substantive offense of extortion, in violation of 18 U.S.C. 1951. He was sentenced to three years' imprisonment and four years' probation. The court of appeals affirmed. Pet. App. C439-C436.

1. The evidence at trial showed that petitioner was the president of a business that promoted the hiring of minority employees by New York construction companies. In 1985, petitioner and an accomplice extorted money from Frank DePalma, the owner of a construction business. DePalma began to cooperate with the authorities and recorded subsequent conversations with petitioner and his accomplice. Those recorded conversations revealed that DePalma made payments to petitioner by hiring a "no-show" employee referred by petitioner's accomplice. Gov't C.A. Br. 2-6.

Petitioner, as described by his counsel, is half black and half Puerto Rican. During jury selection, the government had available six peremptory challenges in the selection of the petit jury and one in the selection of alternate jurors. In the selection of the petit jury, the prosecutor struck two black jurors, one Hispanic juror, and two white jurors; the prosecutor also waived one of his peremptory challenges. In the selection of alternate jurors, the prosecutor exercised

one strike against a black juror. Pet. App. C440; V Tr. 127.

At the close of jury selection, petitioner requested that the magistrate require the prosecutor to justify the use of his strikes against the minority veniremen. The prosecutor objected, indicating that petitioner had not made a sufficient showing to require him to explain his use of peremptory strikes. Without making an express finding on that issue, the magistrate indicated that he would give the prosecutor an opportunity to put on the record his explanations of the peremptory strikes, and the prosecutor did so. Pet. App. C440-C441.

The prosecutor explained that juror Clark, a black man, was struck because he was 23 years old, single, and living at home; his lack of experience made him an inappropriate candidate for foreman, which the prosecutor assumed he would become because he was juror number one. Juror Garcia, an Hispanic man, was struck because of his lack of fluency in English, which prompted concerns that he might not understand the tape recordings to be introduced in evidence. Juror Callier, a black woman, was struck because she had children about the same age as petitioner; the prosecutor thought she might be unduly sympathetic to petitioner for that reason. Juror Brown, a black woman, was struck during the alternate round because she was a social worker, an occupation that the prosecutor believed might make her especially sympathetic to the defense in a criminal case. Pet. App. C441; V Tr. 136,

140-141. 1/

After hearing those explanations, the magistrate rejected petitioner's claim that the prosecutor had discriminated in his use of peremptory challenges. The magistrate concluded that "there was not an intent to make or deprivation of a right to a jury trial by peers." The jury that heard petitioner's case included one black and two Hispanic jurors. Pet. App. C3; V Tr. 151-153.

2. The court of appeals affirmed, rejecting petitioner's contention under Batson v. Kentucky, 476 U.S. 79 (1986), that his conviction should be reversed based on the prosecutor's use of peremptory strikes. The government argued that petitioner had failed to establish a prima facie case of racial discrimination in the prosecutor's use of his peremptory challenges, and that the prosecutor provided satisfactory race-neutral reasons for his strikes. Gov't C.A. Br. 11-18. Without reaching those issues, the court of appeals concluded that relief was not warranted in this case because the racial composition of the jury that ultimately heard petitioner's case approximated a fair cross-section of the racial composition of the community from which the venire was drawn. Pet. App. C443-C445. In so holding, the court

---

1/ The prosecutor also noted that he had used two challenges to remove white jurors and had waived his opportunity to exercise a strike on the fifth round of jury selection, even though at that time there was a black person on the jury panel. V. Tr. 133-134. The record reflects that the defense exercised a peremptory challenge against one of the black jurors on the panel. Id. at 138.

relied on Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989), which had determined that in a challenge to the prosecutor's use of peremptory strikes based on the Sixth Amendment, a conviction should not be reversed in the absence of underrepresentation of minority jurors. 2/ Although recognizing that the Roman analysis might be more suitable for Sixth Amendment claims than for the equal protection claim recognized by this Court in Batson, the court found such a distinction unwarranted in the context of reviewing the prosecutor's use of peremptory challenges. Pet. App. C445.

ARGUMENT

Petitioner challenges the court of appeals' holding that his claim under Batson, even if meritorious, did not entitle him to relief because the jury, as empaneled, fairly represented the minority groups allegedly challenged by the prosecutor on impermissible racial grounds. We agree with petitioner that the rationale on which the court below relied in affirming his conviction is inconsistent with the general approach to the issue of racial discrimination in the exercise of peremptory challenges that this Court employed in Batson. For the reasons set forth below, however, we do not agree that the judgment of the court of appeals in this case

---

2/ Both this case and Roman were decided before this Court held in Holland v. Illinois, 110 S. Ct. 803 (1990), that the Sixth Amendment is not violated by the use of peremptory strikes to exclude minority jurors.

warrants review by this Court.

1. In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held, in a case involving a black defendant, that a prosecutor's use of peremptory challenges to strike black jurors on racial grounds violates the Equal Protection Clause. To establish such a violation, the defendant must show a prima facie case of purposeful discrimination in the selection of the petit jury. If the defendant makes that showing, the burden shifts to the prosecutor to come forward with a neutral explanation for the use of his challenges. That explanation, however, need not rise to the level of justifying the exercise of a challenge for cause. The trial court must then make a finding whether the prosecutor intentionally discriminated on the basis of race. Appellate courts must give "great deference" to the trial court's finding on that issue. 476 U.S. at 94-98 & n.12.

As an initial matter, petitioner did not make the type of factual showing that would establish a prima facie case of intentional discrimination. Although the magistrate did not expressly rule on that issue, his comment that "there is no pattern" of strikes against minorities, V Tr. 153, taken in context, appears to reflect his view that petitioner did not demonstrate threshold facts giving rise to a prima facie case. Indeed, the prosecutor did not engage in a pattern of removing minority jurors; rather, the prosecutor exercised his strikes in the first four rounds against a black, a

white, an Hispanic, and a black; in the fifth round, the prosecutor waived his right to challenge despite the presence of minority jurors on the panel, and in the sixth round, the prosecutor struck a white. In the alternate round, the prosecutor struck a black. The final petit jury included three minority jurors.

That sequence of events does not suggest that the prosecutor was making an effort to remove minority veniremen from the jury. The prosecutor passed up opportunities to exclude minority members in the fifth and final rounds of jury selection. Cf. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) ("The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury."). In addition, nothing in the prosecutor's questions or comments during jury selection in any way suggested an intent to discriminate. Nor did petitioner adduce any other facts to support an inference of discriminatory purpose. On comparable records, the courts of appeals have consistently held that such showings do not establish a prima facie case. 1/

1/ See, e.g., United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990) (government used four of six peremptory challenges to strike blacks, but three blacks sat on jury); United States v. Grandison, 885 F.2d 143 (4th Cir. 1989)

(continued...)

In any event, the purpose of the prima-facie-case standard is to determine whether the prosecutor must explain the reasons for exercising particular peremptory challenges. In this case, the prosecutor did so, and his explanations were clearly adequate under Batson. Cf. United States v. Clemmons, 892 F.2d 1153, 1156 (3d Cir. 1989) (holding that once the prosecutor provides his explanation, the reviewing court should consider it even if a prima facie case was not established), petition for cert. pending, No. 89-7003. The prosecutor's explanations were clear, specific, race-neutral, and related to the particular case to be tried. See Batson, 476 U.S. at 98 & n.20. Juror Clark, a candidate for jury foreman, was struck because of his youth and inexperience. The prosecutor indicated that he might not have struck this juror but for the prospect that he would become foreman. V Tr. 140-141. Courts have recognized that a juror's lack of worldly experience is a pertinent, and legitimate, reason for

---

3/ (...continued)
(government used six of nine peremptory challenges to strike blacks, but two blacks sat on jury and three blacks served as alternates), cert. denied, No. 89-6673 (May 14, 1990); United States v. Rogers, 850 F.2d 435, 437 (8th Cir. 1988) (government used three of seven peremptory challenges to strike blacks; jury included two blacks and one black alternate); United States v. Dawn, 897 F.2d 1444, 1448 (8th Cir. 1990) (government used six of seven peremptory challenges to strike blacks, but jury included two blacks; holding that "numbers alone are not sufficient to establish or negate a prima facie case").

a peremptory challenge. 4/ Juror Garcia "lacked fluency in the English language," which caused the prosecutor strike him because this was "a case where we have to play tapes of people." V Tr. 141. The concern that a juror might not be able to comprehend tape recordings, which are often difficult to understand even for native speakers of English, is an entirely valid reason for exercising a peremptory strike, unrelated to racial grounds. Cf. United States v. Mathews, 803 F.2d 325, 330 (7th Cir. 1986) (juror struck due to her expressed reservations about her ability to understand tape-recorded evidence), reversed on other grounds, 485 U.S. 58 (1988); see also United States v. Rodriguez-Cardenas, 866 F.2d 391, 393 n.2 (11th Cir. 1989) (inarticulate juror), cert. denied, 110 S. Ct. 1110 (1990); United States v. Tucker, 773 F.2d 136, 142 (7th Cir. 1985) (same), cert. denied, 478 U.S. 1021 (1986).

Juror Callier troubled the prosecutor because "she had children the age of the defendant and might have undue sympathy for the defendant" for that reason. V Tr. 140. That is a valid basis for a challenge. United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (jurors or their spouses had jobs that may have caused them to identify with the defendant), cert. denied, 109 S. Ct. 1312 (1989); United

---

4/ United States v. Mitchell, 886 F.2d 667, 671-672 & n.2 (4th Cir. 1989); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 110 S. Ct. 508 (1989); United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), cert. denied, 109 S. Ct. 97 (1988).

States v. Garrison, 849 F.2d 103, 105 (4th Cir.) (jurors' age similarity to defendant might have created sympathy for him), cert. denied, 109 S. Ct. 566 (1988); United States v. McCoy, 848 F.2d 743, 745 (6th Cir. 1988) (young and unemployed juror might have sympathized with defendant who was also young and unemployed). Finally, the prosecutor struck juror Brown as an alternate because she was a social worker. That was also a permissible reason for exercising a peremptory challenge. See United States v. Briscoe, 896 F.2d 1476, 1487-1488 (7th Cir. 1990) (youth supervisor at a juvenile penal center); United States v. Wilson, 867 F.2d 486, 487 (8th Cir.) (juvenile court social worker), cert. denied, 110 S. Ct. 92 (1989).

After presiding over jury selection and hearing the prosecutor's explanations, the magistrate found no intentional discrimination. The magistrate found "no pattern" suggestive of discrimination, pointing out that the government had challenged two white persons and that at least three minority members were chosen to serve on the jury. In addition, the magistrate detailed his views as to the validity of the prosecutor's exclusion of two of the minority jurors. As to juror Clark, the magistrate noted that the prosecutor's desire for "an older mature person with a long work history to judge the credibility in this particular case" was a "rational observation" with which "I have no quarrels[.]" As to juror Brown, the magistrate explained

that "it did not surprise me when the government challenged [her] based upon the fact that she is a social worker." 5/ Summing up, the magistrate stated that, "[i]n any event, in my view the government has explained itself in sufficient detail for me to make the following findings without hesitation. * * * [T]here is no pattern, there was not an intent to make or deprivation of a right to a jury trial by peers. I say that without hesitation for whatever it's worth in this particular case." V Tr. 152-153.

Those findings, amply supported by the record, establish that petitioner's rights under Batson were not violated in this case. In Batson, this Court made clear that:

> "[A] finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

Id. at 98 n.21 (citation omitted). Consistent with that principle, the courts of appeals have applied the clearly erroneous standard in reviewing the determinations of a trial judge that intentional discrimination did not occur. See, e.g., United States v. Power, 881 F.2d 733, 739 (9th Cir. 1989); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 110 S. Ct. 508 (1989); United States v.

5/ The magistrate adverted to a notorious local incident in which a social worker had "balked at returning a verdict in a hijacking case," which had occasioned much discussion among prosecutors about the "wisdom or lack of wisdom about some social workers on the jury." V. Tr. 152-153.

Battle, 859 F.2d 56, 58 (8th Cir. 1988); United States v. Biaggi, 853 F.2d at 96; United States v. Clemons, 843 F.2d 741, 746-747 (3d Cir.), cert. denied, 109 S. Ct. 97 (1988). Applying that standard here, there is no basis for reversing the magistrate's finding that the prosecutor did not act with a discriminatory motive. Accordingly, the judgment of the court of appeals rejecting petitioner's Batson claim is correct.

2. Although petitioner's Batson claim lacks merit, we agree with petitioner that the court of appeals' analysis departed from the general approach to discrimination in jury selection that this Court marked out in Batson. The Court in Batson did not suggest that its equal protection analysis would be inapplicable to a case in which the defendant's jury mirrored the community, and in particular contained members of the defendant's ethnic group roughly proportional in numbers to the representation of that group in the community. Nonetheless, we submit that it is unnecessary for this Court to review the court of appeals' judgment in this case, for several reasons.

First, as we have discussed above, the judgment in this case is correct. The magistrate held that petitioner did not establish a case of racial discrimination in the prosecutor's use of peremptory strikes, and there is no basis for disturbing that conclusion.

Second, the court of appeals' decision was rendered

before this Court's decision in Holland v. Illinois, 110 S. Ct. 803 (1990), in which the Court ruled that the Sixth Amendment does not apply to peremptory strikes. That decision discredited earlier Second Circuit cases on which the court below heavily relied in this case. 6/

Because the appeal in this case was decided prior to Holland, the court of appeals acted in a legal context in which a conviction obtained in the absence of a proportionally representational jury would be reversed on Sixth Amendment grounds when discriminatory strikes have been employed; it then found that the "incremental benefit" of reversing a conviction obtained with a fairly representative jury on equal protection grounds was not warranted. Pet. App. C445. In the wake of Holland, however, it is clear that the Sixth Amendment does not supply a benchmark against which to measure the "incremental" furthering of Batson in cases involving fairly representative juries. Accordingly, the court of appeals may well feel it necessary to reconsider the rationale of this case in light of Holland. 7/

6/ The court of appeals supported the key elements in its holding by relying on its previous Sixth Amendment decisions in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), and Roman v. Abrams, supra.

7/ The court of appeals apparently does not regard itself as bound to apply the analysis employed in this case in all Batson-type cases in which the analysis might be invoked. In the only case in which the Second Circuit has cited the decision below or had occasion to decide whether to apply it, that court did not rely on the holding in this case to

(continued...)

Third, while the Second Circuit's analysis was facially different from the analysis this Court prescribed in Batson, the factor that the court of appeals found dispositive in this case -- the representative composition of the jury -- would be an important factor under conventional Batson analysis in establishing that there was no prima facie case of discrimination in the prosecutor's exercise of peremptory challenges. As a result, few if any cases will come out differently under the two approaches. As we have indicated in our analysis of the case under the principles of Batson, this is certainly not a case that would be decided differently depending on which route the court took to its decision.

There are other reasons as well why few if any cases will be affected by the analysis employed by the court of appeals in this case. District courts have an obligation to remedy instances of intentional discrimination "on the spot, without waiting to see the ultimate composition of the jury."

1/ (...continued)
avoid reaching the merits of the defendant's Batson claim. Rather, the court squarely addressed the question whether Batson was violated; because the court found no violation, it concluded that there was no occasion to consider "whether the group alleged to have been impermissibly challenged is significantly underrepresented in the jury that convicted the appellant." United States v. Ruiz, 894 F.2d 501, 507 n.4 (2d Cir. 1990), quoting United States v. Alvarado, 891 F.2d 439, 445 (2d Cir. 1989). Accordingly, there is no indication that the court of appeals will routinely use its holding below to pretermit review of Batson claims on their merits, even in those relatively few cases to which the court's analysis below would theoretically be applicable.

Pet. App. C445. That responsibility is unaltered by the Second Circuit's rule, which applies only where the trial court has rejected a defendant's Batson claim.

Moreover, in cases in which a Batson claim is rejected at trial, review of that determination on appeal is conducted under a highly deferential standard. Batson, 476 U.S. at 98 n.21; see United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990). Consequently, the trial court's finding of fact that the prosecutor did not practice purposeful discrimination will generally be sustained on appeal absent a clear error on the trial court's part.

Furthermore, the rule at issue in this case could affect the outcome of the case only if enough minority members sat on the jury to approximate their percentage in the community. Although it is theoretically possible for a valid Batson claim to arise even though minority group members are proportionally represented on the jury, we believe it highly unlikely that many claims of discrimination will be substantiated when the prosecutor has accepted enough minority jurors to approximate their representation in the community. If a prosecutor is engaging in discrimination, he is likely to aim at excluding minorities to the greatest extent possible -- a goal that will probably preclude a representative number from being empaneled. On the other hand, a prosecutor who accepts minority members on the jury in about the same proportion as they are found in the

community at large is less likely to be engaged in tacit racial discrimination. For those reasons, we think that cases with facts to which the court of appeals' rule would be applicable will not occur with any frequency. The experience of the courts to date, in which few cases like the present one have been decided, supports that view.

In sum, the issue presented in this case is not of sufficient importance in the administration of criminal justice to warrant review by this Court at this time. No other court of appeals, to our knowledge, has faced a situation similar to that presented in this case. 8/ Nor has any other court of appeals so much as discussed the application of the principle fashioned by the Second Circuit here. 9/

8/ One intermediate state appellate court has applied a principle resembling that discussed by the court of appeals. State v. Vincent, 755 S.W.2d 400, 403 (Mo. App. 1988) (concluding that where all of the prosecutor's six challenges were used to exclude blacks, but five blacks served on the jury, the defendant lacked "standing to raise a Batson challenge"), cert. denied, 109 S. Ct. 3155 (1989). As petitioner notes in his supplemental brief, the New York Court of Appeals in People v. Jenkins, 1990 WL 34716 (Mar. 29, 1990) rejected a similar rule (reproduced at Pet. Supp. Br. App. A). We agree with petitioner that the rationale of Jenkins conflicts with that of the decision here. Based on the magistrate's findings, however, the result in this case is consistent with Jenkins.

9/ Contrary to petitioner's contention (Pet. 9), the holding below was not tantamount to a rule that a prima facie case of discrimination cannot be established if a representative number of members of the pertinent minority group sit on the jury. There is therefore no conflict between the decision in this case and those in cases discussing the effect of minority representation in the jury on the defendant's

(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

MAY 1990

9/ (...continued)
ability to establish a prima facie case of intentional discrimination in jury selection. The fair-cross-section inquiry looks only at two facts: the racial composition of the jury and the racial composition of the community. A rough equivalence between those two numbers does not defeat a showing of a prima facie case of discrimination, although a proportional representation of minority members on the jury may provide supportive evidence undercutting a prima facie case. See United States v. Biaggi, 673 F.Supp. 96, 106 (E.D.N.Y. 1987), aff'd, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989). It is well established that the question whether a prima facie case exists requires consideration of "all relevant circumstances," Batson, 476 U.S. at 96-97, not just a single factor such as the racial composition of the jury. The court of appeals here recognized that principle. Pet. App. C445.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RECEIVED
MAY 21 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HORACIO ALVARADO, PETITIONER

vs. No. 89-6985

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by first class mail on May 21, 1990.

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 DUANE STREET, 10TH FLOOR
NEW YORK, NEW YORK 10007

Kenneth W. Starr

KENNETH W. STARR
SOLICITOR GENERAL

DISTRIBUTED
MAY 25 1990

No. 89-6985

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF A PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner submits this reply pursuant to Rule 15.6 to the government's brief in opposition to the petition for a writ of certiorari.

Petitioner argued to the court of appeals below that he had established a prima facie case of discrimination under the rule of Batson v. Kentucky, 476 U.S. 79 (1986), and that the

government failed to rebut the inference of discrimination. The government argued that there was no prima facie case and that it had race-neutral explanations for each exclusion. These competing claims were not resolved, however, by the court of appeals, which ruled that no appellate inquiry was required into the merits of a Batson claim if the final composition of the jury mirrored the demographic makeup of the district of trial. The government concedes here that the analysis of the court of appeals below was incorrect but urges this Court to deny the petition because there were other grounds on which the court of appeals could have affirmed the district court judgment and the decision of the court of appeals is unlikely to have great impact. The government ignores, however, the significant change in the law wrought by the opinion below. It has presented, at best, an argument for summary reversal (Rule 16.1) and a remand for reconsideration of the arguments originally presented by the parties.

1. The Court of Appeals Failed to Resolve the Substantial Issue Whether the Government Adequately Justified Its Strikes

The government repeats its arguments to the court of appeals below that using four of its seven peremptory challenges to exclude minority group members did not establish a pattern, that Juror Garcia was excluded because he was not fluent in English, Juror Callier because she had children the same age of the defendant, Juror Brown because she was a social worker and Juror Clark because he was too young and inexperienced to be a foreperson. The government leaves out those facts

demonstrating that these justifications were pretextual: The record shows that Juror Garcia answered all questions put to him in perfectly fluent English, and the government's only complaint about him on appeal was that he spoke with a "heavy accent." Three white jurors had children similar in age to the defendant's, but only a black juror was excluded. Nor did the government exclude Frank Neimeroff, a paraprofessional guidance counselor, balking only at Mrs. Brown, a black social worker. Finally, the trial judge instructed the jury to select a foreperson itself and nothing prevented the government from making such a request before trial rather than excluding a black man based on the assumption that he must necessarily be the foreperson. Petitioner agrees that these issues should be dispositive of this case. They should be resolved by the court of appeals on remand.

2. The Court of Appeals Has Already Refused to Reconsider its Ruling in Light of Holland v. Illinois

The government suggests that the court of appeals may not accord much precedential weight to the opinion below because it was based on princ ples discredited by this Court in Holland v. Illinois, 110 S. Ct. 803 (1990). But Holland was decided before the court below had denied petitioner's application for rehearing with a suggestion for rehearing en banc. Petitioner's counsel notified the court below of Holland immediately after it was decided and argued, in a letter to the Court pursuant to Fed. R. App. P. 28(j), for reconsideration in its light. The court then denied rehearing. There is

therefore no indication that the court below considers Holland dispositive of the issue whether the final composition of the jury defeats a Batson claim without regard to the pattern of strikes or the quality of the government's explanations.

3. The Issue Presented is Important

The government finally suggests that the issue presented is unimportant because few cases will be affected by what the government agrees was the erroneous analysis below. The government suggests that the final composition of the jury is important to "conventional Batson analysis" so that few cases will be resolved differently under the two standards. But under conventional Batson analysis, even one discriminatory strike is unconstitutional. The final composition of the jury may be invoked as proof that there was no discriminatory intent, but reversal is mandated if discriminatory intent is proven by other evidence. United States v. Clemmons, 843 F.2d 741, 747 (3d Cir. 1988), cert. denied, 109 S. Ct. 97 (1988); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Under the erroneous analysis below, in contrast, the final composition of the jury defeats a Batson claim no matter what, without regard to the strength of any other evidence of discrimination.

The government finally argues that this case is unimportant because district judges still have the obligation to rule on Batson claims "on the spot" and review of their decisions is so deferential that reversal is rarely required.

No. 89-6985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of petitioner's reply in support of a petition for a writ of certiorari have been served by express mail on the Solicitor General of the United States, and that one copy has been similarly served on the United States Department of Justice, Criminal Division.

Dated: New York, New York
May 24, 1990

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES APPEALS UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO.

ORIGINAL

ORIGINAL

No. 89-6985

Supreme Court, U.S.
FILED
APR 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO

ABRAHAM L. CLOTT,
Of Counsel.

No. 89-6985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT
OF A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Horacio Alvarado submits this supplemental brief in support of his petition for a writ of certiorari in

accordance with Rule 15.7 of this Court to call this Court's attention to a decision not available at the time of petitioner's last filing.

A RECENT DECISION BY THE NEW YORK COURT OF APPEALS HOLDS THAT BATSON REQUIRES A NEW TRIAL WHEN THE GOVERNMENT HAS DISCRIMINATED DURING JURY SELECTION IRRESPECTIVE OF THE FINAL COMPOSITION OF THE JURY AND IS IN DIRECT CONFLICT WITH THE RULING IN PETITIONER'S CASE

Petitioner has requested that this Court review the decision below that intentional discrimination by the government during selection of a petit jury is without remedy on appeal if the final composition of the jury reflected the demographic composition of the district of trial. That decision conflicts with general principles underlying prior decisions of this Court and with the decisions of other circuits. That decision also now conflicts with the opinion of the highest court of New York, which rejected on federal constitutional grounds the precise theory adopted by the Second Circuit below. People v. Jenkins, 1990 WL 34716 (N.Y. March 29, 1990) (copy attached).

In Jenkins, a prosecution, like this one, of a black Hispanic, the People used seven of its ten peremptory challenges to exclude blacks. Two of the three blacks not dismissed by the State had associations with law enforcement and were therefore dismissed by the defense. Accordingly, the final jury included only one black. When defense counsel moved for a mistrial in reliance on Batson, the trial court ruled that there was no prima facie case of discrimination and declined the prosecutor's offer to explain the challenges.

The Appellate Division reversed and ordered a new trial on the ground that the pattern of strikes against blacks evinced a discriminatory use of peremptory challenges. In the New York Court of Appeals, the People argued "that since three blacks were left unchallenged by the prosecutor, the defendant had a jury containing a percentage of blacks (25%) closely reflecting the percentage of the black population of the Bronx at the time of trial (30%)." [WL pg 2.]

A unanimous Court of Appeals rejected the People's argument--identical to the rule of decision below--stating "[a] Batson violation is not avoided, however, simply because notwithstanding the discriminatory use of peremptory strikes, the prosecutor leaves some blacks on the jury panel and those left are enough to form a petit jury containing a percentage of blacks not significantly lower than the percentage of blacks in the local community." [WL pg 4.] The court gave two reasons for its holding: first, Batson protects not only the interest of a defendant in being tried by a jury with a particular racial composition, but the interest of potential jurors in not being excluded because of their race and the interest of society in maintaining a system of criminal justice that is both fair in fact and perceived as fair [WL pg 4]; and second, the percentage of blacks on the final jury is irrelevant to equal protection analysis because "such considerations more aptly pertain to those guarantees of the sixth Amendment relating to the composition of the venire" [WL pg

5]. "Concepts of 'representative venire' and 'fair cross-section' of the community," reasoned the court, "cannot legitimize a prosecutor's discriminatory exercise of peremptory challenges in violation of the Equal Protection Clause." [WL pg 5.] The New York Court of Appeals accordingly agreed with the Appellate Division that the defendant had established a prima facie case of discrimination but ordered a remand for a hearing at which the prosecutor's reasons for the strikes could be evaluated.

The statement of the New York Court of Appeals is simple and correct: "For the purposes of equal protection, the constitutional violation is the exclusion of any blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks." [WL pg 5.] That statement is in accord with the principles laid down by this Court and with the decisions of other circuits cited in the petition. It is unseemly that this correct rule should apply at 100 Centre Street in the Supreme Court of New York but not across the street at Foley Square at the United States Court House. This Court should grant the petition for a writ of certiorari to resolve this conflict and make clear that the equal protection principle bars all discrimination by the government in jury selection.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
April 5, 1990

Respectfully submitted,

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO

ABRAHAM L. CLOTT,
Of Counsel.

A D D E N D U M

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE

NEW YORK REPORTS.

The PEOPLE & c., Appellant,
v.
Alexander JENKINS, Respondent.
38.
Court of Appeals of New York.
March 29, 1990.

ALEXANDER

On this appeal from an order of the Appellate Division, reversing defendant's conviction, after jury trial, of robbery in the second degree and ordering a new trial because the prosecutor purposefully excluded blacks from the petit jury in violation of the Equal Protection Clause of the Fourteenth Amendment (Batson v. Kentucky, 476 U.S. 79), the People argue that no pattern of discriminatory use of peremptory challenges was shown and that because the number of blacks remaining on the jury, despite the exercise of their peremptory challenges, reflected the percentage of blacks in the community, any presumption of discriminatory use of peremptory challenges was overcome.

Alternatively, the People urge that by ordering a new trial instead of remanding for a hearing, the Appellate Division improperly deprived them of an opportunity to offer non-pretextual, race-neutral reasons for the suspect peremptory challenges.

We conclude that defendant demonstrated a prima facie case of discrimination in the People's use of their peremptory challenges, but because we agree that the Appellate Division's remedial action was improper, we modify by remitting to that court for further proceedings in accordance with this opinion.

I Defendant and co-defendant Ronald Johnson, both of whom are black, were indicted for various crimes arising out of an armed robbery of a supermarket in Bronx County and a subsequent exchange of gunfire with pursuing police officers. The indictment charged them with two counts of attempted murder of a police officer, robbery in the first and second degrees, and criminal possession of a weapon.

During the voir dire at the ensuing trial, a total of 10 black and 37 white and Latino surname prospective jurors were examined during nine rounds of questioning. The prosecutor exercised ten peremptory challenges, seven of which were used to remove seven of the ten blacks on the panel while only three were used against the 37 white and Latino surname members of the panel.

The Appellate Division concluded from its examination of the record that the seven blacks challenged by the prosecution were a heterogeneous group of both sexes from different occupations and social backgrounds. Four of them were identifiable: one of the males was a psychiatric aide married to a former nurse; another male was a Con Edison employee; a third male was a computer programmer who had served on a Grand Jury and the female was an unemployed factory supervisor whose husband and child were employed by a food company.

 The record did not specifically identify which three of the remaining six venirepersons peremptorily challenged by the prosecution were black. However, of the three blacks on the panel not peremptorily challenged by the prosecutor, two had associations with law enforcement: one was a part-time security guard at Shea Stadium and Madison Square Garden whose duties included restraining alleged wrongdoers and turning them over to the police; the other had a brother in law enforcement and had served on a grand jury for a "number of years." Defense counsel challenged these two prospective jurors and the one remaining black was seated on the final jury along with eleven whites.

In support of a timely mistrial motion, defense counsel pointed out for the record that both defendant and his counsel, as well as the codefendant were black, and that the population of Bronx County was at least 50% black. [FN1] Defense counsel also argued that the prosecutor was aware that a prudent defense attorney would exercise peremptory challenges against two of the black venirepersons not removed by the prosecution since one was associated with law enforcement and the other a "professional grand juror." This, he argued, was consistent with the prosecutor's strategy to allow a token number of blacks to remain on the panel unchallenged in order to avoid a charge of systematic exclusion.

During the colloquy following a defense objection to the peremptory strikes, the prosecutor volunteered that "if [counsel] would like me to go [in]to the qualifications of each of the other jurors, I would go through them at this time." The trial court denied the mistrial motion, concluded that there had not been any systematic exclusion and declined the prosecutor's offer to explain her challenges. The jury subsequently convicted defendant of second degree robbery. On appeal, a divided Appellate Division reversed the conviction and ordered a new trial, concluding that a "pattern of strikes against blacks" evincing a discriminatory use of peremptory challenges had been established. Leave to appeal to this court was granted to the People by a dissenting justice of the Appellate Division.

The People argue that inasmuch as the prosecutor did not exclude all blacks from the jury defendant failed to establish a prima facie showing of discrimination under Batson v. Kentucky (476 U.S. 79). They further argue that since three blacks were left unchallenged by the prosecutor, the defendant had a jury containing a percentage of blacks (25%) closely reflecting the percentage of the black population of the Bronx at the time of trial (30%).

Based on these percentages they argue that defendant cannot establish a "real claim of discrimination" because he was not prevented by the actions of the prosecutor from having a jury whose racial makeup was roughly representative of his own race in the community. Additionally, they contend

that in concluding that there had been a Batson violation, the Appellate Division considered as a "relevant circumstance", improperly ascribed to the People, the defendant's exercise of two peremptory challenges against black venirepersons. Finally, the People argue that in any event, assuming a prima facie case of racial discrimination in jury selection was established, by ordering a new trial of this 10 year old case rather than remanding for a hearing, the Appellate Division deprived the People of an opportunity to demonstrate non-pretextual race-neutral reasons for the exercise of their peremptory challenges.

II That the racially motivated exercise of peremptory challenges by the

 prosecution violates the Equal Protection Clause of the Fourteenth Amendment, is no longer open to question. Batson v. Kentucky, 476 U.S. 79; Griffith v. Kentucky, 479 U.S. 314; People v. Scott, 70 N.Y.2d 420; see also People v. Kern, Lester & Ladone, --- N.Y.2d ---- [case No. 43] [decided today]). In order to establish a prima facie case of discrimination based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the petit jury, a defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire, and (3) facts and other relevant circumstances sufficient to raise an inference that the prosecutor used the challenges to exclude people because of their race (Batson v. Kentucky, 476 U.S. 79, 96-98, supra; People v. Scott, 70 N.Y.2d 420, 423). In tendering a prima facie case of racial discrimination, defendant "may rely upon the presumption that peremptory challenges permit discrimination by those who are inclined to discriminate" (People v. Scott, 70 N.Y.2d 420, 423) and the court may properly consider that a "/pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" (Batson v. Kentucky, 476 U.S. 79, 96-97, supra). Once defendant has made a prima facie showing of discrimination, the burden shifts to the prosecution to come forward with non-pretextual race-neutral explanations for challenging the black jurors (id. at 96-97). It is not sufficient for the prosecution to merely allege its good faith or to claim that those jurors stricken likely would be biased because they share the defendant's race (Batson v. Kentucky, 476 U.S. 79, 96-98, supra; see People v. Hernandez, --- N.Y.2d ---- [decided February 22, 1990]).

Turning to the facts of this case, we agree with the Appellate Division majority that a "pattern of strikes" was established prima facie. The prosecutor used only ten peremptory challenges, seven of which were used to strike

seven of the ten blacks on the jury, while only three peremptory challenges were used against the 37 nonblacks. Not only were a disproportionate number of blacks excluded, but also the prosecutor's exclusion of black venirepersons who as the Appellate Division concluded were "a heterogeneous group of both sexes with different occupations and social backgrounds" and did not otherwise appear to be unsuited for jury service on this case, raises an inference that the prosecutor impermissibly measured prospective black jurors by an unconstitutional standard: specifically, their race. These circumstances were sufficient to establish a "pattern of strikes" against black prospective jurors based "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant" (People v. Scott, 70 N.Y.2d 420, 425, quoting Batson v. Kentucky, 476 U.S. at 96-98 supra).

Moreover, it cannot be said, on this record, that the Appellate Division erred as a matter of law in considering as a "relevant circumstance," in determining whether or not a pattern of discriminatory strikes had been shown, the fact that the People did not exercise peremptory challenges against the two black prospective jurors who had relationships with law enforcement. It was not unreasonable to assume that in a case involving crimes against police officers defense counsel would be particularly intent on excluding from the jury panel persons who had any connection with law enforcement. Thus,in these circumstances, the inference that the prosecution used its peremptory

 challenges discriminatorily is not diminished by the prosecutor's failure to challenge these two prospective jurors.

The People argue however, that absent the peremptory strikes of two blacks by the defense, the jury would have been composed of a percentage of blacks commensurate to the percentage of blacks in the community of Bronx County.

Thus, according to the People, because they did not strike all blacks from the panel, no discriminatory use of peremptory challenges was demonstrated. We reject these arguments.

A defendant is entitled to a jury composed of "/neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds' "(Batson v. Kentucky, 476 U.S. 79, 86, supra, quoting Strauder v. West Virginia, 100 U.S. 303, 308). A Batson violation is not avoided, however, simply because notwithstanding the discriminatory use of peremptory strikes, the prosecutor leaves some blacks on the jury panel and those left are enough to form a petit jury containing a percentage of blacks not significantly lower than the percentage of blacks in the local community.

This is so for two reasons. First, Batson's interdiction of the discriminatory use of peremptory challenges

safeguards the right to equal protection not only of a defendant but of citizens who are called for jury duty as well. The exercise of peremptory challenges against prospective jurors solely because of race discriminates unconstitutionally against the excluded juror (Batson v. Kentucky, 476 U.S. at 87-88; People v. Kern, --- N.Y.2d ---- [Case No. 43] [decided today]). Jury duty is an important privilege and obligation of citizenship that should not be denied to some citizens simply because of their race. As we have only today noted in People v. Kern (--- N.Y.2d ---- [Case No. 43] [decided today]) the Batson Court recognized that it was both the defendant and the excluded juror who were denied equal protection (Batson v. Kentucky, 476 U.S. at 87-88, supra; see also Strauder v.

West Virgina, 100 U.S. at 308, supra). The Supreme Court's decision to prohibit racial discrimination in the exercise of prosecution peremptories was also premised upon the injury to the criminal justice system inherent in such discrimination: The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others" (Batson v. Kentucky, 476 US at 87-88, supra [citations omitted]).

Surely, jurors dismissed because of their race will leave the courtroom with a lasting impression of exclusion from jury participation and perhaps of isolation from mainstream society generally (see Holland v. Illinois, --- U.S. ---, --- S Ct. ----, 58 USLW 4162, 4165 [Kennedy, J., concurring]). No argument based on percentages of the population would remove from these excluded prospective jurors the sense of exclusion resulting from being assumed to be incompetent to sit on a jury solely because of their race. Further, this type of discrimination undermines public confidence in the fairness of our system of justice (Batson v. Kentucky, 476 U.S. at 87, supra) and is repugnant to the just operation of a free society. Thus the fact that all black jurors

 were not removed by the prosecution's discriminatory use of peremptory challenges does not render the use against some any less a violation of Batson.

Second, any consideration of the percentage of blacks remaining on the petit jury compared to the percentage of blacks in the community of the Bronx is irrelevant to an Equal Protection analysis under the Fourteenth Amendment (Holland v. Illinois, --- U.S. ---, --- S Ct ---- 58 USLW 4162). Contrary to the assertions of the People and the

dissenting justice at the Appellate Division such considerations more aptly pertain to those guarantees of the Sixth Amendment relating to the composition of the venire. Defendant raises no such claim here. Nevertheless the People attempt to invert the Sixth Amendment concept of a "representative venire" drawn from a fair cross-section of the community to impose it upon the petit jury selection in support of the conclusion that since blacks remaining on the jury following completion of the exercise of peremptory challenges by the People were fairly representative of the blacks in the Bronx community there had not been any violation of the Fourteenth Amendment's Equal Protection guarantee against the discriminatory use of peremptory challenges.

This argument is fatally flawed. Concepts of "representative venire" and "fair cross-section" of the community cannot legitimize a prosecutor's discriminatory exercise of peremptory challenges in violation of the Equal Protection Clause. For the purposes of equal protection, the constitutional violation is the exclusion of any blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks.

III Notwithstanding our agreement with the Appellate Division that the defendant sufficiently demonstrated prima facie a discriminatory use of peremptory challenges by the People, we note that unlike the prosecution in People v. Scott (70 N.Y.2d 420), here the People apparently were prepared to offer non- pretextual race-neutral explanations for the exercise of their peremptory challenges which may have successfully rebutted defendant's prima facie showing. The trial court summarily rejected this offer, however, based upon its conclusion, in reliance upon Swain v. Alabama (380 U.S. 202), that there had not been any "systematic exclusion" of black jurors. Batson of course, overruled Swain in part and established new criteria and procedures for determining whether peremptory challenges were being impermissibly used for discriminatory purposes.

The Appellate Division declined to remit for a hearing in order to provide the People an opportunity to explain their pattern of strikes against black prospective jurors, reasoning that a hearing would be inappropriate because of the lapse of nine years since the trial and "the improbability of reconstructing the voir dire." Consequently, the court vacated the conviction and ordered a new trial. The People contend however, that they should be afforded an opportunity to demonstrate non-pretextual race-neutral explanations for their peremptory challenges against black jurors pointing out that the trial court rejected their offer of reasons at the time of the voir dire.

While we acknowledge the difficulty the lapse of time may well present, we nevertheless conclude that the People should be afforded the opportunity requested. In other contexts we have held that the "People are [ ] entitled to a

hearing when a Court makes an error of law which functionally deprives the

PAGE 6 People of their one opportunity to put in their case [ ]" (People v. Giles, 73 N.Y.2d 666, 671; see also cases cited therein). Here, as in Giles, it was the "ruling by the hearing court" applying the then-valid pre-Batson law and "not a failure of proof by the People" that resulted in the lack of race- neutral reasons in the record to explain the exercise of their peremptory strikes against blacks (id). Indeed the record is clear that the prosecutor offered to give such explanations, but that offer was rejected by the court.

The rationale of fairness has guided us in according such an opportunity to the People in the past (People v. Giles, 73 N.Y.2d 666, 671, supra) and is no less applicable here.

Because the Appellate Division's decision was made on the law and it does not appear that the court exercised its factual review powers, the case should be remitted to the Appellate Division for determination of the facts (CPL 470.25 [2][d]; 470.40[2][b]). If on such review, the Appellate Division determines that the judgment of conviction should be affirmed, it should remit to Supreme Court for a hearing to afford the People an opportunity to establish non- pretextual race-neutral explanations for the exercise

No. 89-6985

RECEIVED
APR - 6 1990
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner

-v.-

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby hereby certifies that three copies of the within supplemental brief in support of the petition for a writ of certiorari have been served by express mail on the Solicitor General of the United States, and that one copy has been similarly served on the United States Department of Justice, Criminal Division.

Dated: New York, New York
April 5, 1990

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Attorney for Petitioner ALVARADO.

of their peremptory challenges. If such legitimate explanations are not satisfactorily established, the judgment of conviction should be vacated and a new trial ordered. Should it be determined that the prima facie demonstration of racially-motivated exercise of peremptory challenges is satisfactorily rebutted, the judgment of conviction should be amended to show that result.

Accordingly, the order of the Appellate Division should be modified, and the case remitted to that court for further proceedings in accordance herewith. * WACHTLER, C.J., and SIMONS, KAYE, TITONE, HANCOCK and BELLACOSA, JJ., concur.

FN1. The People point out, as did the dissenting justice at the Appellate Division, that this percentage figure is a gross exaggeration. The Appellate Division noted that according to the 1980 census report of the Bureau of the Census of the U.S. Department of Commerce, blacks constituted 28.9% of the total Bronx population while Latinos constituted 33.9%, 2% of whom identified themselves as Latino-black.

N.Y.,1990.

The PEOPLE & c., Appellant, v. Alexander JENKINS, Respondent.

1990 WL 34716 (N.Y.)END OF DOCUMENT

SUPREME COURT OF THE UNITED STATES

HORACIO ALVARADO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-6985. Decided June 25, 1990

PER CURIAM.

At his criminal trial, petitioner claimed that the Government used certain peremptory challenges to remove black jurors solely on the grounds of race, contrary to *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The District Court accepted the Government's explanations for its challenges, and petitioner was convicted. He pursued his *Batson* claim in the Court of Appeals, claiming that the the Government's explanations were pretextual. The Government asserted that petitioner had not made out a prima facie *Batson* error and that it had race-neutral reasons for each challenge. The Court of Appeals did not rule on these competing claims, for it held that no appellate inquiry was required into the merits of a *Batson* claim if the jury finally chosen represented a fair cross section of the community, as did this jury. The conviction was affirmed.

Petitioner, seeking certiorari, urges that the Court of Appeals relied on an erroneous ground in rejecting the *Batson* claim. The United States agrees that the Court of Appeals erred in holding that as long as the petit jury chosen satisfied the Sixth Amendment's fair cross-section concept, it need not inquire into the claim that the prosecution had stricken jurors on purely racial grounds. That holding, the Government states, is contrary to *Batson* and is also discredited by our decision in *Holland* v. *Illinois*, 493 U. S. —— (1990), which held that the fair cross-section requirement of the Sixth Amendment did not apply to the petit jury and which was handed down after the Court of Appeals issued its opinion below. The Government urges us to deny certiorari, how-

ever, because petitioner failed to make out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral, grounds for decision that the Court of Appeals did not reach.

When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court. See, *e. g.*, *Biddle* v. *United States*, 484 U. S. 1054 (1988); *Malone* v. *United States*, 484 U. S. 919 (1987). Nor is it novel to do so in a case where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here. Indeed, a case decided earlier this Term presented such a situation and, without dissent, we vacated the judgment below for reconsideration in light of the position asserted by the Solicitor General in this Court. *Chappell* v. *United States*, 494 U. S. —— (1990). This is the appropriate course to follow in this case. If the judgment below rested on an improvident ground, as the Government suggests, the Court of Appeals should in the first instance pass on the adequacy of the Government's reasons for exercising its peremptory challenges.

Consequently, the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed May 21, 1990.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

HORACIO ALVARADO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-6985. Decided June 25, 1990

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

I have previously expressed my doubt as to the wisdom of automatically vacating a Court of Appeals judgment favorable to the government when the Solicitor General confesses error in this Court. See *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting). Today the Court carries this unfortunate practice to new lengths: the Solicitor General has not confessed error in this case, but instead has taken the position that the judgment of the Court of Appeals was correct and that certiorari should be denied.

The Solicitor General's brief in opposition contains the following statement:

> "Although petitioner's *Batson* claim lacks merit, we agree with petitioner that the Court of Appeals' analysis departed from the general approach to discrimination and jury selection that this Court has marked out in *Batson*."

The Court seizes upon this concession that the "analysis" of the Court of Appeals may have been wrong as a justification for vacating the judgment. But the entire thrust of the Solicitor General's brief is that the result reached by the Court of Appeals was correct.

A confession of error is at least a deliberate decision on the part of the Solicitor General to concede that a Court of Appeals *judgment* in favor of the government was wrong. In the present case, however, we have only the above quoted

statement of the Solicitor General in his brief opposing a grant of certiorari. If we are now to vacate judgments on the basis of what are essentially observations in the Solicitor General's brief about the "approach" of the Court of Appeals in a particular case, I fear we may find the Solicitor General's future briefs in opposition much less explicit and frank than they have been in the past. Since we depend heavily on the Solicitor General in deciding whether to grant certiorari in cases in which the government is a party, the Court will be the loser as a result.